

Message Text

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ACTION EB-08

INFO OCT-01 EUR-12 ISO-00 L-03 FRB-01 OMB-01 ITC-01
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CEA-01 SS-15 CAB-05 DODE-00 DOTE-00 FAA-00 FMC-02
CG-00 DLOS-09 OES-07 NSCE-00 SSO-00 ICAE-00
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TO SECSTATE WASHDC IMMEDIATE 7421

UNCLAS SECTION 01 OF 02 OTTAWA 02496

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SUBJECT: CANADIAN PAPER ON LIABILITY SYSTEM UNDER A
CONVENTION ON MULTIMODAL TRANSPORT

REFS: (A) BURBRIDGE/JOHE (EB/TRA/MA) TELECON 5/16/78;
(B) OTTAWA 605

1. BURBRIDGE, EXECUTIVE DIRECTOR, INTERNATIONAL TRANSPORT
POLICY COMMITTEE, CANADIAN TRANSPORT COMMISSION, TOLD US
CANADIAN DELEGATION VISITING WASHINGTON MAY 25 TO DISCUSS
POSITIONS FOR FIFTH UNCTAD INTERGOVERNMENTAL PREPARATORY
GROUP (IPG) SESSION ON INTERNATIONAL MULTIMODAL TRANSPORT
WOULD LIKE TO HAVE US REACTION AT MAY 25 MEETING TO
CANADIAN PAPER INTENDED TO PROVIDE FURTHER ELABORATION OF
GROUP "B" STATEMENT ON LIABILITY AND INSURANCE MADE AT
THIRD IPG. HE POINTED OUT THAT CANADIAN PAPER IS INTENDED
FOR DISCUSSION PURPOSES AND IS NOT A FINAL CANADIAN
POSITION.

2. TEXT OF CANADIAN PAPER FOLLOWS:
QUOTE. CANADIAN PAPER ON LIABILITY OF THE MTO UNDER A
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CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT.

1. THE CANADIAN DELEGATION REAFFIRMS ITS SUPPORT FOR THE
GENERAL PRINCIPLES UNDERLYING GROUP B'S POSITION ON THE
LIABILITY OF THE MTO AS PROPOSED AT THE FIRST PART OF THE
THIRD SESSION OF THE IPG. THE DELEGATION ALSO WISHES TO
BRING TO THE ATTENTION OF OTHER MEMBER COUNTRIES OF GROUP B

ITS UNDERSTANDING WITH RESPECT TO GROUP B'S APPROACH TO THE BASIC LIABILITY SYSTEM.

2. THIS PAPER ATTEMPTS TO FOCUS IN PARTICULAR ON THE PARTS OF GROUP B'S POSITION WHICH ARE REFLECTED IN SUB-PARAGRAPHS (A), (B) AND (C) OF PARAGRAPH 29 OF DOCUMENT TD/B/AC.15/18 DATED 20 MAY 1976 (REPORT OF THE IPG ON THE FIRST PART OF ITS THIRD SESSION). THESE SUB-PARAGRAPHS ARE QUOTED BELOW FOR EASE OF REFERENCE:

'(A) THE CONVENTION SHOULD PROVIDE FOR A BASIC LIABILITY SYSTEM UNDER WHICH THE MTO IS RESPONSIBLE FOR LOSS OF OR DAMAGE TO CARGO DURING THE ENTIRE MULTIMODAL TRANSPORT. THIS SHALL APPLY ALSO WHEN IT CAN BE ASCERTAINED THAT THE LOSS OR DAMAGE OCCURRED DURING A PARTICULAR LEG OF THE MULTIMODAL TRANSPORT;

'(B) THE BASIC RULE OF LIABILITY REFERRED TO UNDER (A) SHALL BE BASED ON FAULT WITH A REVERSED BURDEN OF PROOF. THIS MEANS THAT THE MTO SHALL BE LIABLE UNLESS HE CAN PROVE THAT THE LOSS OR DAMAGE WAS NOT DUE TO FAULT ON HIS PART. LOSS OR DAMAGE CAUSED BY THE MTO'S SERVANTS, SUB-CONTRACTORS OR OTHER AGENTS SHALL BE CONSIDERED AS CAUSED BY THE MTO;

'(C) THE LIABILITY OF THE MTO SHALL BE LIMITED AT A LOW OR MODERATE LEVEL. GROUP B HAS NO FIXED POSITION AS UNCLASSIFIED

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REGARDS THE LIMIT. IT CONSIDERS, HOWEVER, THAT THE LIMIT SHALL NOT BE LOWER THAN THAT APPLYING TO SEA CARRIAGE AND SHALL NOT BE AS HIGH AS THE HIGHEST LIMIT APPLICABLE TO UNIMODAL TRANSPORT UNDER INTERNATIONAL CONVENTIONS, E.G. THOSE RELATING TO CARRIAGE BY AIR OR RAIL. WITH RESPECT TO CASES WHERE IT CAN BE ASCERTAINED THAT THE LOSS OR DAMAGE OCCURRED DURING A PARTICULAR LEG OF THE MULTIMODAL TRANSPORT, AND THE LEGAL REGIME APPLICABLE TO THAT LEG PROVIDES FOR A HIGHER LIMIT OF LIABILITY THAN THE BASIC LIMIT, THE MTO SHALL BE LIABLE UP TO THAT HIGHER LIMIT;'

3. IN ANALYSING THE PRINCIPLES INVOLVED IN THE ABOVE THREE SUB-PARAGRAPHS, THE FOLLOWING QUESTIONS COME TO MIND:
(A) DOES SUB-PARAGRAPH (A) ABOVE MEAN THERE WILL BE A FLOOR PROVIDING FOR A MINIMUM COMPENSATION IN ALL CASES INVOLVING THE MTO'S LIABILITY?

(B) TO WHAT EXTENT WILL THE UNIMODAL RULES AS A WHOLE (CONTRASTED WITH THE LIABILITY RULES AND MONETARY LIMIT) OF THE UNIMODAL CONVENTION PROVIDING FOR A HIGHER MONETARY LIMIT APPLY AS BETWEEN THE MTO AND THE SHIPPER? (NOTE: FOR THE PURPOSES OF THIS PAPER, THE WORD 'SHIPPER' MAY

INCLUDE THE CONSIGNOR, CONSIGNEE OR CARGO OWNER.)

(C) WHAT WOULD BE THE STATUS OF A RECOURSE ACTION BETWEEN THE MTO AND THE SUBCONTRACTOR, I.E., WOULD IT NECESSARILY INVOLVE THE PRIOR SETTLEMENT OF THE CLAIM BETWEEN THE MTO AND THE SUBCONTRACTOR IN ORDER TO FINALIZE THE CLAIM BETWEEN THE MTO AND THE SHIPPER? (NOTE: "SUBCONTRACTOR" MEANS ANY PERSON OF WHOSE SERVICES THE MTO MAKES USE FOR THE PERFORMANCE OF THE MULTIMODAL TRANSPORT CONTRACT.)

(D) IF THE SUBCONTRACTOR IS EXONERATED FROM LIABILITY, WOULD THE MTO STILL BE LIABLE AT THE UNIFORM LEVEL (A FLOOR) TO THE SHIPPER?

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4. IN THE CANADIAN VIEW IT IS NOT POSSIBLE TO SEPARATE THE MONETARY LIMIT FROM THE UNIMODAL LIABILITY RULES AS THE FORMER IS PART OF THE ECONOMIC PACKAGE BUILT INTO THE LATTER. THUS, IT APPEARS NECESSARY TO APPLY THE UNIMODAL REGIME FOR DETERMINATION WHETHER THE SUBCONTRACTOR IS LIABLE TO THE MTO UP TO THE HIGHER 'LIMIT' IN ORDER, IN TURN, TO DETERMINE THE LEVEL OF LIABILITY OF THE MTO TOWARDS THE SHIPPER. IF THIS REASONING IS CORRECT, THEN IT APPEARS THAT THE REFERENCE TO HIGHER 'LIMIT' IN GROUP B'S POSITION IS INTENDED TO TRIGGER THE APPLICATION OF THE WHOLE UNIMODAL LIABILITY REGIME. THIS MEANS THAT THE 'NETWORK LIABILITY RULE' WOULD HAVE TO APPLY IN THE HIGHER 'LIMIT' CASES.

5. THE CANADIAN DELEGATION IS OF THE OPINION THAT A POSS-

IBLE SOLUTION MAY BE FOUND BY GIVING INTERPRETATION TO
GROUP B'S POSITION ALONG THE FOLLOWING LINES:

(A) THE BASIC (UNIFORM) LIABILITY SYSTEM (WHICH WOULD BE
BASED ON FAULT WITH A REVERSED BURDEN OF PROOF) AND
MONETARY LIMITATION SHALL ACT AS A FLOOR IN ALL CASES
INVOLVING THE MTO'S LIABILITY, AND THE MTO SHALL COMPENSATE
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THE SHIPPER IN ACCORDANCE WITH THE RULES AND THE LIMITATION
AMOUNT FIXED IN THE MULTIMODAL CONVENTION.

NOTE: THIS SETTLEMENT WOULD TAKE PLACE IRRESPECTIVE OF
WHETHER OR NOT THE LOSS OR DAMAGE CAN BE ATTRIBUTED TO A
PARTY WITH A LEGAL LIABILITY REGIME PROVIDING FOR A HIGHER
COMPENSATION THAN THE FIXED LEVEL OF LIABILITY OF THE MTO.

(B) IF THE LOSS OR DAMAGE CAN BE ATTRIBUTED TO A SUB-
CONTRACTOR WITH A HIGHER LIMIT OF LIABILITY THAN THE
MTO'S FIXED LEVEL OF LIABILITY, THE APPLICATION OF THE
APPLICABLE LEGAL REGIME OF THAT SUBCONTRACTOR SHALL
DETERMINE WHETHER THE SHIPPER IS ENTITLED TO SUCH A
HIGHER COMPENSATION FROM THE MTO. THIS MAY BE ACHIEVED
BY USING THE FOLLOWING ALTERNATIVES:

(I) THE CONVENTION COULD PROVIDE THAT THE MTO WILL BE
REQUIRED TO PURSUE THE CLAIM AGAINST THE RESPONSIBLE
SUBCONTRACTOR, BOTH IN HIS PERSONAL CAPACITY AND IN THE
NAME OF THE ORIGINAL SHIPPER, AND IF HE IS SUCCESSFUL HE
SHALL BE UNDER THE OBLIGATION TO PAY THE DIFFERENCE BETWEEN
THE BASIC (UNIFORM) LIMIT AND THE SUBCONTRACTOR'S HIGHER
LIMIT TO THE SHIPPER; OR

(II) THE CONVENTION COULD PROVIDE FOR A RIGHT OF SUB-
ROGATION IN FAVOUR OF THE SHIPPER AT THE SHIPPER'S REQUEST
IN ORDER TO ALLOW HIM TO SUE DIRECTLY THE RESPONSIBLE SUB-
CONTRACTOR. IN THIS CASE, THE MTO SHOULD BE UNDER THE
OBLIGATION TO ASSIST THE SHIPPER WITH ALL EVIDENCE. IN
THE EVENT THE SHIPPER IS SUCCESSFUL, HE SHALL REIMBURSE
THE MTO THE AMOUNT HE HAS COLLECTED FROM HIM IN THE FIRST
PLACE (PURSUANT TO 5 (A) ABOVE).

NOTE: THE PREVAILING RULE SHOULD BE THE FIRST OPTION
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PURSUANT TO THE PRINCIPLE THAT THE ONUS IS ON THE MTO
TO PAY THE HIGHER LIMIT. THE SECOND OPTION SHOULD BE MADE

APPLICABLE ONLY IF SO REQUESTED BY THE SHIPPER IN ORDER TO
TAKE CARE OF SITUATIONS WHERE THE SHIPPER FEELS HE HAS
GREATER INCENTIVE THAN THE MTO TO PURSUE THE CASE OR HE
HAS BETTER CHANCE OF SUCCESS IN PURSUING THE CLAIM AGAINST
THE SUBCONTRACTOR. UNQUOTE. ENDERS

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